Supreme Court, U.S.
FILED
MAY 9 1980
R., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1593

GULF OIL CORPORATION, SCALLOP NUCLEAR INC., and GENERAL ATOMIC COMPANY,

Petitioners,

v.

PENNSYLVANIA POWER & LIGHT COMPANY,

Respondent

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

PETITIONERS' REPLY MEMORANDUM.

GORDON W. GERBER
FRANK J. EISENHART, JR.
FRED T. MAGAZINER
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 972-3400

THOMAS J. CALNAN, JR.
STAMBERG, CAPLAN & CALNAN
534 Turner Street
Allentown, PA 18102
(215) 434-4206

Attorneys for Petitioners

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

	Page
PETITIONERS' REPLY MEMORANDUM	1
A. Introduction	1
B. This Court Has Never Considered the Meaning of Due Process in the Context of a Civil Trial Before Jurors With an Adverse Pecuniary Interest	2
C. The Due Process Clause Applies to "Private Breach-of-Contract Actions"	2
D. Voir Dire Does Not Provide Protection	3
E. PP&L's Brief in Opposition Misstates the Record	4
CONCLUSION	5

TABLE OF CITATIONS.

Cases:	Page
Clark v. United States, 61 F. 2d 695 (8th Cir. 1932), aff'd, 289 U. S. 1 (1933)	2
Gibson v. Berryhill, 411 U. S. 564 (1973)	2
Irvin v. Dowd, 366 U. S. 717 (1961)	3
Ward v. Village of Monroeville, 409 U. S. 57 (1972)	2
Winthrow v. Larkin, 421 U. S. 35 (1975)	2
Statutes:	
United States Constitution, Fourteenth Amendment	1
Authorities:	
McCormick on Evidence § 60 at 137 (2d ed. 1972)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1593

GULF OIL CORPORATION, SCALLOP NUCLEAR, INC., and GENERAL ATOMIC COMPANY,
Petitioners,

v.

PENNSYLVANIA POWER & LIGHT COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

PETITIONERS' REPLY MEMORANDUM.

A. Introduction.

The pending Petition for Writ of Certiorari presents this question: Under the due process clause of the Fourteenth Amendment, can a defendant be forced to defend itself before a jury each of whose members will benefit, possibly by as much as $289, if the plaintiff prevails? In its Brief in Opposition to Petition for Writ of Certiorari, respondent Pennsylvania Power & Light Company ("PP&L") seeks to portray this question as one of little importance which already has been decided by this Court. PP&L is wrong.

B. This Court Has Never Considered the Meaning of Due Process in the Context of a Civil Trial Before Jurors With an Adverse Pecuniary Interest.

PP&L contends that the applicable due process standards are well settled. The cases PP&L cites (Brief in Opposition 8), however, involve judges,[1] administrative agencies [2] and licensing boards.[3] PP&L can offer no authority whatsoever for its assertion that for due process purposes, "[i]t has not mattered whether the finder of fact is a jury, a judge, or something else." (Brief in Opposition 8). The plain fact is that this Court has never considered whether lay jurors ought to be allowed to decide cases in which they have a pecuniary interest. The present case offers the Court an opportunity to decide whether PP&L is correct in suggesting that in the law of disqualification for interest, unlike the law of evidence,[4] lay jurors are to be equated with professional judges and administrative tribunals.

C. The Due Process Clause Applies to "Private Breach-of-Contract Actions".

PP&L repeatedly points out that this case is "a private disagreement between the parties" (Brief in Opposition 3) and "a private breach-of-contract action" (Brief in Opposition 7, 10). PP&L apparently would advocate that due process be accorded only to a criminal defendant, not to civil litigants, such as petitioners Gulf Oil Corporation, Scallop Nuclear Inc. and General Atomic Company

1. *Ward v. Village of Monroeville*, 409 U. S. 57, 60-61 (1972).

2. *Gibson v. Berryhill*, 411 U. S. 564 (1973).

3. *Winthrow v. Larkin*, 421 U. S. 35, 46-47 (1975).

4. *See, e.g., Clark v. United States*, 61 F. 2d 695 (8th Cir. 1932), *aff'd*, 289 U. S. 1 (1933); *see also McCormick on Evidence* § 60 at 137 (2d ed. 1972). (Note that the citation to McCormick in the Petition, p. 12, should read "§ 60", not "360".)

(hereinafter referred to collectively as "General Atomic"), which face a claim against them for damages of $274 million or more. The reach of due process may need clarification by this Court but there is certainly no basis for limiting its application to criminal cases only. Even "private" litigants are entitled to a fair trial.

D. *Voir Dire* Does Not Provide Protection.

PP&L argues that General Atomic can achieve an unbiased jury by the exercise of its right to challenge jurors for cause. (Brief in Opposition 12-13). This alleged right does not provide either theoretical or actual protection.

First, PP&L ignores the numbers. Fully 98.5% of Lehigh County's residents are PP&L customers. In other contexts where, as here, virtually every juror has a disabling bias, the law recognizes that a change of venue is the appropriate remedy. In the case of pre-trial publicity, for example, a change of venue is mandated where the right to challenge for cause is illusory. *See, e.g., Irvin v. Dowd*, 366 U. S. 717 (1961).[5]

Second, PP&L ignores the difference between questioning a juror to ferret out his prejudices about others and asking a juror to analyze the extent to which his own self-interest—his chance to enrich himself—may color his perception of a case. None of the cases which PP&L cites or which this Court has decided concerned the problem of jurors acting in their own self-interest.

5. PP&L's actions demonstrate its recognition that, as a practical matter, General Atomic cannot challenge 98.5% of the veniremen on *voir dire* and thereby obtain an impartial jury: When General Atomic offered to withdraw its change of venue motion upon PP&L's stipulation that all jurors would be drawn from the 1.5% of Lehigh County residents who are not PP&L customers, PP&L flatly refused to so stipulate.

E. PP&L's Brief in Opposition Misstates the Record.

PP&L's summary of the record is inaccurate.

The crucial fact underlying General Atomic's Petition is that every juror who is a PP&L customer has a pecuniary stake in the outcome of the case. PP&L attempts to avoid this fact (Brief in Opposition 5-6) and even suggests that the record shows that PP&L might *not* pass through any recovery to its customers.[6] As the Superior Court of Pennsylvania observed (A4), however, PP&L's own Vice President and Comptroller admitted that "the tendency of any PUC ruling would be to reduce the electric bills to PP&L's customers."

6. PP&L also urges on this Court the following sentence from the Pennsylvania Superior Court's Opinion (A16): "The fact that a person is a customer of PP&L does not itself mean that he has an interest adverse to [the petitioners]." PP&L's characterization of this statement as a "determination", not a "finding of fact", is deliberate. The statement is nothing more than a conclusion of law, and is not entitled to any particular weight in this Court.

PP&L's assertions (Brief in Opposition 5 & n. 5) that some of the facts which General Atomic recited on pages 4 through 6 of the Petition are "contrary to" or "in some respects diverged from" the Superior Court's view are meaningless since they are supported neither by explanation nor citation to the record.

CONCLUSION.

For the reasons set out above and in their Petition, Petitioners urge the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

GORDON W. GERBER
FRANK J. EISENHART, JR.
FRED T. MAGAZINER
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 972-3400

THOMAS J. CALNAN, JR.
STAMBERG, CAPLAN & CALNAN
435 Turner Street
Allentown, PA 18102
(215) 434-4206

Attorneys for Petitioners